No. 85-6956

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

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LEVIS LEON ALDRICH,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a criminal defense lawyer is found to have performed deficiently under the first prong of Strickland v. Washington by gross neglect of his duty to investigate and prepare for trial, can the "prejudice" required under the second prong of Strickland be established on the basis of his failure to impeach crucial prosecution witnesses in a closely balanced case, or must the defendant show "prejudice" by producing after-discovered evidence affirmatively supporting his innocence?

2. Did the Court of Appeals below misconstrue the prejudice requirement of Strickland by holding, in a capital case where it found that defense counsel's "failure to take depositions and to investigate" fell below minimum constitutional standards for attorney competence:

(A) that prejudice under Strickland could not be shown solely through defense counsel's failure to discover and present facts impeaching the credibility of a prosecution witness "who furnished the only direct evidence that [the defendant] ... committed murder," and through counsel's failure to conduct an adequately prepared cross-examination of this witness and another who provided "[s]ome of the most damaging testimony" against the defendant in an otherwise weak prosecutive case, but rather

(B) that prejudice could only be shown by producing "evidence ... in ... post-conviction proceedings ... that could have been discovered and presented at trial ... that would have clearly corroborated [the defendant's] ... alibi or supported [his lawyer's] ... speculation" that other persons had committed the capital offense?

3. Did Florida's pre-Lockett application of its capital sentencing statute to preclude all nonstatutory mitigating circumstances violate the Eighth and Fourteenth Amendments in this case by excluding the only mitigating feature of record in this case -- residual doubt about guilt -- from the sentencing determination?

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Petitioner, LEVIS LEON ALDRICH, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed August 28, 1985, and states:

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 777 F.2d 630 (11th Cir. 1985), and is set out at pages 1a-15a of the Appendix.[1] The summary orders denying rehearing and rehearing en banc are unreported and are set out at App. 16a, 17a. Tne Orders of the United States District Court, Southern District of Florida, dismissing the petition for writ of habeas corpus, dated December 2, 1983 and June 8, 1984 are unreported, and are set out in the Appendix at pages 18a-24a and 25a-27a respectively.

JURISDICTION

The judgment and opinion of the Court of Appeals were filed on November 19, 1985, and petitioner's timely petition for rehearing was denied on December 27, 1985. Thereafter, Justice Powell entered an order extending the time within which to file

[1] Citations to the Appendix accompanying this petition are designated App. ___.

the petition for writ of certiorari to and including May 26, 1986. That date was "a federal legal holiday" and "the next day [which was not] a federal legal holiday" was May 27, 1986. Rule 29.1, Rules of the Supreme Court of the United States. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defence;

and the Fourteenth Amendment to the Constitution, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

A. Course of Prior Proceedings

On January 8, 1975, Mr. Aldrich was convicted of first degree murder and sentenced to death in the Circuit Court for the Nineteenth Judicial Circuit of Florida. R 82, 84.[2] The Florida Supreme Court affirmed the judgment and sentence, and certiorari was denied. Aldridge v. State, 351 So.2d 941 (Fla. 1977), cert. denied, 439 U.S. 972 (1978).

Thereafter, post-conviction relief was sought in the state trial court, and the denial of relief after an evidentiary hearing was affirmed. Aldridge v. State, 425 So.2d 1132 (Fla.),

[2] The following symbols will be used herein to denote references to the various portions of the record that were before the Court of Appeals below:

RA -- The Record on Appeal (Volumes 1-7);

R -- Record on appeal in the Florida Supreme Court on direct appeal;

T -- Transcript of the state trial and sentencing;

RH -- Record on appeal to the Florida Supreme Court from the denial of post-conviction relief; and

TH -- Transcript of the state post-conviction hearing.

cert. denied, 461 U.S. 939 (1983). An original petition for writ of habeas corpus was also filed in the Florida Supreme Court and denied. Aldridge v. Wainwright, 433 So.2d 988 (Fla. 1983).

Mr. Aldrich filed his federal habeas corpus petition in the United States District Court for the Southern District of Florida on June 15, 1983. RA 1-376.[3] On December 2, 1983, the district court denied the petition as to all but one issue, RA 596-602, and on June 4, 1984, entered a final order denying the petition and issuing a certificate of probable cause. RA 1803-05. On November 19, 1985, a divided panel of the court of appeals affirmed the district court's order. Aldrich v. Wainwright, 777 F.2d 630 (11th Cir. 1985).

B. Material Facts

Levis Aldrich was charged with murdering Robert Ward during the course of a robbery in Ft. Pierce, Florida on September 3, 1974. The robbery apparently occurred as Mr. Ward, the manager of Al DiVagno's restaurant, was locking up for the evening. Mr. Ward called his wife at 12:05 a.m. to indicate to her that he was about to leave. T 219-20. Thereafter, at 12:14 a.m. the police received a signal from the restaurant's burglar alarm, T 223, and upon their arrival at 12:19, they found Mr. Ward's body beside his automobile at the side of the restaurant. The burglar alarm had been activated by the opening of an office door inside the restaurant where the safe was located. T 267-68. The owner estimated that between $600 and $900 was taken in the robbery. T 307-09.

The state's case was wholly circumstantial. The owner of the restaurant, Al DiVagno, testified that Mr. Aldrich had worked for him for about three months in 1974, but that he had fired Mr. Aldrich in July or August for trying to "boss" the other kitchen employees. T 315-17. During the period of his employment, he knew that Mr. Aldrich had become familiar with the closing

[3] Jurisdiction of the federal court was invoked pursuant to 28 U.S.C. § 2241 and § 2254, the petitioner being held in the custody of the State of Florida, and petitioner alleging that such custody was in violation of the Constitution of the United States.

procedures and the burglar alarm system at the restaurant. T 315-16. A restaurant employee testified that Mr. Aldrich had told her that he planned to "hit" the restaurant after he was released on parole. T 504.[4] A person confined with Mr. Aldrich at the Community Correctional Facility, Norman Sapp, also testified that Mr. Aldrich planned to "hold up" the restaurant after he was paroled. T 334. Two young girls testified that on the night of the robbery and homicide, they were with a man named Charles Strickland when he gave the murder weapon (a shotgun) to a man he referred to as "Levi" in the parking lot of a Ft. Pierce hotel. T 392-97, 401-05. They could not identify "Levi" as Mr. Aldrich, but one of them identified a photograph of Mr. Aldrich's car as the car into which "Levi" put the gun. T 392-95, 401-02.

According to the prosecution's evidence, two other events occurring after the robbery and homicide tended to tie Mr. Aldrich to the crime. At 1:00 a.m. on September 3, a security guard saw a car like Mr. Aldrich's car leave the vicinity of a warehouse where the shotgun was supposedly hidden following the crime. T 280-85. Thereafter, at 2:00 a.m. Mr. Aldrich drove slowly past Al DiVagno's restaurant. Because this seemed suspicious to the police officers who were still at the restaurant, an officer stopped Mr. Aldrich. T 292-97. The officer found that Mr. Aldrich had several hundred dollars in cash "stuffed" in his pockets and wallet. T 295, 303, 305. Mr. Aldrich explained that he had received the bulk of the cash upon being paroled a few days earlier and invited the police officers to his hotel room where he showed them a Department of Corrections receipt, as well as pay stubs from the FMC Corporaton (where Mr. Aldrich was then employed), which confirmed his explanation. T 299-300.

The only other evidence presented by the state -- the testimony of Charles Strickland -- was quite clearly the most important evidence, for he pieced together the state's other circumstantial evidence. Strickland testified that he knew Mr. Aldrich because they had both been inmates at the Ft. Pierce

[4] At the time, Mr. Aldrich was in a work release program at the Community Correctional Facility in Ft. Pierce. T 421-22.

Community Correctional Facility. T 342-43. By September 2, 1974, however, both were on parole. T 345-46. On that date, he agreed to loan Mr. Aldrich his shotgun, which he owned in violation of the terms of his parole. Id. He said that he transferred the gun to Mr. Aldrich at 7:30 p.m. in the parking lot of the Ft. Pierce Hotel. Id. Later that night, according to Strickland, Mr. Aldrich called and told him that he had killed someone with the gun. T 352. The next day Mr. Aldrich asked Strickland to accompany him to retrieve the gun from the warehouse area where he had hidden it. Id.[5] He said that during the trip to the warehouse, Mr. Aldrich explained that he had robbed Al DiVagno's restaurant but that before he could leave, the restaurant employee who was still at the restaurant "grabbed for his mask and he had to shoot him ...." T 382. When Mr. Aldrich shot the man, the restaurant's door slammed, and "when the door slammed shut the [burglar] alarm went off." Id. After he and Mr. Aldrich retrieved the gun, Strickland disposed of it because he believed that his illegal possession of the gun would lead to being charged with the murder. T 357. He also admitted that when the state attorney first questioned him about the gun, he lied under oath as to what had happened to it. T 359, 371-72.

Mr. Aldrich's defense was that the state had failed to prove his guilt beyond reasonable doubt. In support of this position, counsel relied upon an alibi presented solely by Mr. Aldrich's testimony and upon the view that Charles Strickland's testimony was an incredible attempt to conceal his own role in the crime. See generally T 672-89.

Mr. Aldrich testified that on the night of the robbery and homicide he went fishing until 10:30 or 11:00 p.m., that he then went to a bar, and that he stayed at the bar until 1:30 or 2:00 a.m. T 516-18. Upon leaving the bar, he drove toward the home of a Mrs. Fish in order to finalize the rental of a room in her house. Even though it was late, Mrs. Fish had told him that she

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5 This was the same warehouse area in which the security guard had seen a car similar to Mr. Aldrich's car at 1:00 a.m., shortly after the homicide.

often stayed up until 4:00 a.m. T 519. On the way he drove slowly by Al DiVagno's restaurant looking for the road which would take him to Mrs. Fish's house. T 519-20. At that point he was stopped by the police. He explained that he was carrying several hundred dollars in cash at the time because he had no bank account and was afraid to leave his money in the hotel room where he had been staying. T 520-21.

The defense presented no other witnesses. Defense counsel argued to the jury, however, that the evidence left too much doubt about Mr. Aldrich's guilt to convict him. Since Mr. Aldrich knew so much about the restaurant and would obviously be a prime suspect if it were robbed, counsel argued that it was illogical for Mr. Aldrich to consider robbing it -- and to connect himself to the robbery by driving by the restaurant after it had occurred. See T 677-78. He further argued that the crime scene evidence created doubt about Mr. Aldrich's participation in the crime, for Mr. Aldrich would have known that the burglar alarm had to be turned off before opening the door of the inside office in order not to alert the police to the robbery. T 679. He argued that even Charles Strickland's testimony concerning Mr. Aldrich's explanation of the circumstances of the homicide showed that Mr. Aldrich was not involved. Mr. Aldrich knew that the burglar alarm was silent and was activated by opening a door, yet Strickland testified that Mr. Aldrich told him the alarm had been set off (apparently audibly) by the slamming of a door. T 679-79. Finally, he argued that Mr. Strickland had lied in order to conceal his role in the crime and to direct the police away from himself. T 679-87. Strickland admittedly owned the murder weapon and gave it to the triggerman, and "[w]hoever got that gun from Strickland went out there and committed this crime ...." T 681-82.

C. Material Post-Conviction Evidence

A hearing was held in the state trial court limited to the claim of ineffective assistance of counsel. Defense counsel, Elton Schwarz, the elected public defender for the judicial circuit and his assistant Willie Gary testified. Bruce Wilkinson, who had originally been assigned Mr. Aldrich's case and who was familiar with the caseload situation at in the public defender's office at the time, also testified. An expert witness, appointed by order of the court, Gregory Scott, Esquire, provided expert opinion on the question of the effectiveness of counsel's representation as contrasted to prevailing professional norms at the time of the trial.

Mr. Aldrich was arrested on September 9, 1974 and at his initial appearance hearing the Office of the Public Defender was appointed to represent him. TH 241. Thereafter, the Public Defender, Elton Schwarz,[6] assigned assistant public defenders Wilkinson and Schopp to his case. By the date of arraignment, Mr. Aldrich brought to the court's attention that his case was not being prepared adequately. T 4. As counsel testified, "very little," TH 243, 248, investigation was done during this five week period. Assistant public defender Wilkinson was involved in "at least six other capital cases at various stages" including one capital trial in late September, TH 246-248, along with a "full complement of other felonies," TH 256. Investigation was limited hence, to trying to verify Mr. Aldrich's finances from the work release center, and to trying preliminarily to track down an alibi, by speaking with the clerk of the hotel where Mr. Aldrich lived and going to a bar. TH 243-244, RH 241-244. Though investigation was limited at this point, it

6 Mr. Schwarz is the elected Public Defender for the four-county 19th Judicial Circuit of Florida, and thus was responsible for providing representation to all indigent persons charged with a crime in the four counties.

turned out to be the only investigation of any substance that counsel was able to accomplish prior to trial.[7]

On October 31, 1974, Mr. Aldrich was again before the court and he again asked that someone other than the Public Defender's Office be appointed to represent him because he believed that the Public Defender had too many cases and insufficient time to devote to his case. T 6. The trial court told Mr. Aldrich that if he were dissatisfied with the lawyers assigned to him, he should talk to Mr. Schwarz, the Public Defender, and told him that he could not appoint another lawyer to represent him. T 7, 8. The next day the trial court brought Mr. Aldrich into chambers without counsel, and told him that he could not appoint another lawyer but that the Public Defender, Mr. Schwarz, would personally be present to represent him at trial -- "to sit in the trial with you." T 17. The Public Defender then met with Mr. Aldrich and told him "I guarantee you we don't let any case go to trial when we haven't adequately prepared because we can always ask for a continuance because we have not had time to prepare for it...." RH 211.[8]

7 The sum of the investigation at this point were three contacts made by an investigator. On September 16 the investigator spoke with Rosemary Grabhorn, the clerk at the hotel where Mr. Aldrich was living, to confirm that he stayed there. RH 243. He spoke with the record keeper at the community release center on the same day, confirming that Mr. Aldrich had $558 in his account when he was released. RH 243. On September 30, the investigator spoke with JoAnn Desmarais who said Mr. Aldrich was in her bar from 12:30-1:00 a.m. on the night of the offense and did not act unusual or nervous. RH 244. Someone also called the sheriff's office to ask for a picture of Mr. Aldrich. RH 251.

8 Mr. Schwarz's promise to Mr. Aldrich not to go to trial without preparation came during a lengthy and detailed interview with him on November 6, 1974. During that interview, Mr. Schwarz repeatedly reassured Mr. Aldrich in addition to that quoted in the text that the case would be investigated: that "two full time investigators can do that work on your behalf" RH 208; "if I handle a case I'm gonna handle it right and I'm gonna make sure its ready for trial before we go to trial," RH 213, and "I believe in exploring all the possibilities." RH 218.

Mr. Schwarz assigned the case to himself even though his schedule was "such that I would not want to undertake the responsibility of assuring that he receives a fair trial on my own." T 10-11; R 40-41; TH 164. Mr. Schwarz's office's workload was in the process of tripling. As Mr. Schwarz testified: "we had more capital cases at that time we've ever had since I've been in office, at any one given time." TH 168.[9]

The workload of Mr. Schwarz's office was such that in October, 1974, he would have moved to withdraw as counsel in this case, if there had been the legal authority that there is now under Escambia County v. Behr, 384 So.2d 147 (Fla. 1980) permitting a public defender's office to withdraw as counsel due to "excessive caseload" which would "compromise the effectiveness of representation." TH 180-81.

Due to this schedule and caseload, at the time Mr. Schwarz took over the representation of Mr. Aldrich, Mr. Schwarz informed the court that while he would be personally present at trial, he would be unable to assume responsibility for the preparation of the case for trial. R 40-41; TH 164. Thus, as Mr. Schwarz further informed the court, he had no option but to assign the preparation of the case for trial to Willie Gary, a legal intern in his office, who was "the only other personnel available for preparation of this case for trial." R 40. Mr. Gary was thus "in charge of the preparation of [Mr. Aldrich's] case for trial." R 31; TH 166.[10]

9 Mr. Schwarz also had other matters that demanded his personal attention including being "active at that time with the State Public Defender's Association on general legislative matters." TH 167. In fact during his initial interview with Mr. Aldrich on November 6 in which he assured him that the case would be prepared, Mr. Schwarz told Mr. Aldrich that "I've got to go to Tallahassee tomorrow ... and I'm gonna take a couple of weeks off...." RH 207. Also, one of the grounds put forth by counsel for a continuance was that he and his chief investigator were "scheduled to be in Key West [during the week of trial] for the purpose of attending the Mid-Winter Conference of the Florida Public Defender Association." R 32.

10 Mr. Gary had begun working part-time for the Public Defender in September, 1974 shortly after graduation from law school. After taking the Bar examination in October, he began working full time. On November 7, 1974 Mr. Gary was certified as a legal intern. He was licensed to practice law on December 20, 1974. TH 110-111. Mr. Gary was at that time thus "fairly inexperienced." TH 125.

Despite Mr. Schwarz's apparent delegation of responsibility for preparation of the case to Mr. Gary, Mr. Gary did not perceive himself as being in charge of anything since was only an intern. TH 112-13. He perceived his role as to assist Mr. Schwarz at the actual trial of the case. TH 113. Thus, Mr. Gary primarily was trying to get himself familiar with the case by reading the file. TH 14. Mr. Gary also had additional responsibilities during this time with an assigned caseload of misdemeanor and juvenile cases, TH 167, and being the "on call" lawyer for the office, TH 155. As he testified, the office was "a rat race." TH 154.

Mr. Gary did not really get involved in trying to prepare for trial until two or three weeks before it was scheduled for trial (January 6, 1975). TH 114-15. The only investigation Mr. Gary could recall was going to a bar once with an investigator to look for witnesses. TH 115-16.[11] Mr. Schwarz, consistent with what he had told the judge, was unable to prepare the case himself. He did not become involved in attempting to prepare the case until one or at most two weeks before trial. TH 166. Even then there was no active investigation undertaken.

Because of his lack of preparation, Mr. Schwarz moved for a continuance four days before the trial was scheduled to begin. RH 32-33. The motion for a continuance was filed in good faitn because counsel "just didn't have the time and at the last minute it slipped up on us ..." TH 120. Thus, counsel had just recently become actively involved in preparing the case and hence had just realized the amount of investigation and preparation that had to be done, TH 176: "I guess we just got caught sleeping, 'cause we kind of thought we'd automatically get the continuance with the magnitude of the case that we had, and [the caseload] in the Public Defender's Office...." TH 120-21. The

11 Mr. Gary was apparently referring to a contact made on December 12, 1974 by an investigator with JoAnn Desmarais in which she said that Mr. Aldrich came into the bar at 12:30 a.m. and stayed until 1:00 a.m. on the night of the homicide. RH 247. The investigator concluded that she "is a very accurate and positive witness [who would] make a good impression upon the jury." RH 248.

motion for continuance was heard on the day of trial, January 6, 1975. Mr. Schwarz flatly asserted: "This case is not prepared. We are not in a position to provide competent legal representation." T 26. He had never been required to go to trial in less than four months in a capital case. TH 72. Mr. Schwarz believed that since no previous continuances had been requested or granted, there would be no reason to deny the continuance. TH 177. Thus on the morning of trial both counsel believed that the continuance would be granted. TH 121-22. They had set up depositions of the state witnesses for the following week. The trial court did not find that the case had in fact been adequately prepared, but denied the continuance on the ground that: "There has been ample time for everybody to be fully prepared." T 26.

Mr. Schwarz testified unequivocally at the state post-conviction hearing that as a result of their lack of pre-trial preparation, he and Mr. Gary were totally unprepared for trial of Mr. Aldrich's case, TH 175, 239: "I don't ever recall going to trial even on a misdemeanor case in the state of readiness that we were in at that time," TH 179, noting that if he were forced again to go to trial in such a state of readiness, he would "stand mute." TH 239. As a result of counsel's inability to and failure to prepare for trial, virtually no investigation was undertaken and no discovery was conducted. The defense was unable to and failed to take any depositions. Of the forty-five persons listed by the prosecution in its seven witness lists (filed between November 8, 1974 and January 3, 1975), the defense deposed none -- although counsel had scheduled depositions for the week <u>after</u> the trial. Mr. Schwarz testified that depositions were essential to his representation of Mr. Aldrich, TH 173, as did Mr. Gary, TH 151, Mr. Wilkinson, TH 254, and the expert witness, TH 286.

Though the state, pursuant to discovery rules, provided statements it had taken from seven of the forty-five persons on its witness lists, both counsel testified that such nonadversarial, ex parte statements were not a sufficient substitute for

thorough discovery depositions. TH 118-19, 172-74. (<u>See also</u> TH 289. Of the forty-five witnesses listed by the state, the defense had investigated only one noncentral witness -- the record keeper at the correctional facility. There were at least thirty witnesses provided by the state of which the defense had no prior knowledge. TH 175. Of the eighteen witnesses presented at trial, counsel had prior knowledge of only seven and then only from nonadversarial statements taken by the state. As the prosecutor emphasized during trial, counsel never contacted the witnesses though they were willing to talk. T 25. Even the defense witnesses were not investigated. Of the seven witnesses listed by the defense on its witness list only two had been spoken with by the defense.[12] Moreover, of the forty-one items of physical evidence introduced at trial by the prosecution, the defense had examined none, though it was available for inspection, as the prosecutor continually reminded the court and jury (e.g. T 222, 237, 247, 277-78).

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS MISAPPLIED <u>STRICKLAND V. WASHINGTON</u> BY APPLYING A DISTINCTION, EXPRESSLY DISAPPROVED BY THIS COURT, BETWEEN IMPEACHMENT AND EXCULPATORY EVIDENCE IN THE DETERMINATION OF PREJUDICE RESULTING FROM THE DENIAL OF THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, BY HOLDING THAT PREJUDICE COULD NOT BE ESTABLISHED ON THE BASIS OF COUNSEL'S FAILURE TO IMPEACH CRUCIAL PROSECUTION WITNESSES IN A CLOSELY BALANCED CASE, BUT RATHER REQUIRED PRODUCTION OF AFTER-DISCOVERED EVIDENCE AFFIRMATIVELY SUPPORTING INNOCENCE.

"Prejudice" is the only issue in this case. Did the court of appeals' majority properly apply the "prejudice prong" announced by the Court in <u>Strickland v. Washington</u>, ___ U.S. ___, 104 S.Ct. 2052 (1984)? Specifically did the majority below misapply <u>Strickland</u> by holding that ineffective counsel's failure

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12 This witness list was filed on the day of trial, despite the requirement that it be filed within seven days of the receipt of the state's answer to discovery (filed in this case two months previously). <u>Fla.R.Crim.P.</u> 3.220(b)(3). The late filing of this list further demonstrates counsel's unpreparedness as does the fact that defense counsel listed "witnesses" that he had not even contacted. Moreover, though the defense at trial turned out to be an alibi, counsel never filed a "notice of alibi" as required by the rules before presenting witnesses other than the defendant.

to impeach the prosecution's key witnesses (also suspects) cannot alone establish prejudice, but that only counsel's failure to present evidence affirmatively and "clearly" showing Mr. Aldrich's innocence can?

Three reasons make this case appropriate for certiorari. First, the court of appeals has read into Strickland's test for prejudice resulting from ineffective assistance of counsel a distinction between "impeachment" and "exculpatory" evidence that this Court has expressly rejected in evaluating the prejudice associated with the prosecution's failure to disclose evidence favorable to the accused. Second, the court of appeals' distinction between "impeachment" and "exculpatory" evidence has caused it to ignore the fundamental teaching of Strickland that prejudice should be measured by the materiality of the omitted evidence rather than by its artificial categorization as "impeachment" or "exculpatory." Third, this case presents the ideal record for the Court's explication of the true meaning of "prejudice" in situations where "a verdict or conclusion [is] only weakly supported by the record," Strickland, 104 S.Ct. at 2069, and where counsel's deficiencies resulted in a failure to weaken the prosecution's marginal proof still more. This is a case where "innocence" is truly at issue because of the slimness of the prosecutive proof, where all courts with jurisdiction have found counsel to be deficient in the gross lack of preparation, but where, notwithstanding, the defendant's death sentence has been sustained. Without the Court's correction of the court of appeals' misapplication of Strickland, Mr. Aldrich and others like him -- convicted of capital murder on evidence that is weak, without the effective assistance of counsel, but without the ability to show their innocence affirmatively and "clearly" -- will die, never having had a fair and reliable trial.

As brief background, the offense in the instant case involved an unwitnessed killing that occurred during a robbery. There was no physical evidence implicating Mr. Aldrich and no custodial statement. The key actors at the trial included Charles Strickland, a felon who illegally purchased, used, owned,

disposed of and lied about the murder weapon, and who said that Mr. Aldrich borrowed that weapon before the offense, telephoned him afterwards to say he had had to shoot a man, and wanted Strickland's help in getting rid of the weapon. On the other side was Mr. Aldrich who testified that he had nothing to do with the robbery/murder, but rather was fishing and thereafter in a bar during the time that the offense was carried out. Thus, as Judge Johnson explained "there was no one piece of conclusive evidence ... that would have precluded an effective defense. Nor was there an overwhelming amount of evidence from which a jury could draw but one conclusion." 777 F.2d at 644; App. 15a (Johnson, J., dissenting). In summary, "the outcome [of the trial] depended upon which of two stories the jury believed, where there were substantial reasons to disbelieve either one." Id.[13]

In this setting in which the evidence was so closely balanced that even slight changes in the evidence would tip the inferences to be drawn from it toward either side -- in which the assistance of counsel is most crucial precisely because the facts do not weigh toward a particular result -- counsel utterly failed to carry out his duties to investigate, discover, and prepare to meet the prosecution's case. Because of an extreme case overload in the public defender's office, counsel moved for and fully anticipated a continuance of the trial, having only begun to prepare the case a week before trial, having done only the barest of investigation, and not having deposed the state's

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13 The case was summarized succinctly by Judge Johnson's opinion.

> Petitioner was convicted on the basis of evidence that was far from strong. No physical evidence implicating Aldrich was recovered at the scene of the killing. While in custody, Aldrich made no statements resembling a confession. The only direct evidence implicating Aldrich was testimony from a convicted felon who had violated the terms of his parole and lied to police investigators, and who was the other most likely suspect in the crime. It is in light of this record that counsel's errors take on their full significance.

777 F.2d at 642; App. 13a.

witnesses as is the right of every Florida criminal defendant.[14] When the continuance was denied, as counsel testified, they were "caught sleeping" and were manifestly unprepared: "I don't recall going to trial, even on a misdemeanor case, in the state of readiness we were in at that time."

The results of this deficient lack of preparation were three-fold. First, counsel's deficient representation lost powerful means of impeaching the two key state witnesses, Charles Strickland and Norman Sapp, by evidence showing their motive and opportunity for committing the offense and for blaming it on Mr. Aldrich. Second, counsel lacked the ability to corroborate Mr. Aldrich's alibi by independent investigation and even by information counsel already had but of which counsel was unaware or unprepared to use. Third, counsel was forced to conduct a "seat-of-the-pants" "fishing expedition" in examining witnesses with the predictable result of eliciting highly prejudicial and otherwise inadmissible testimony.

"Prejudice" as defined by Strickland[15] was established by these facts, but the court of appeals misapplied that standard by

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14 Though it is recognized that most jurisdictions (including federal) do not grant the right to pretrial depositions, since it is an absolute right in Florida, depositions are the primary investigative tool in Florida. Their importance is beyond question. See Valle v. State, 394 So.2d 1004 (Fla. 1981) (capital conviction reversed because counsel had only been able to depose 24 of the 59 state witnesses, without regard to what those depositions may have revealed).

15 The law on prejudice from ineffective representation of counsel has undergone significant evolution in this case since the collateral proceedings were begun in 1979. When the state post-conviction motion was filed, the only published standard for evaluating such claims was a "mockery and farce" test. When the case was heard and decided at the state trial and appellate level on post-conviction, the prejudice standard was the "outcome determinative" test of Knight v. State, 394 So.2d 997 (Fla. 1981). Then in the federal district court on habeas corpus the case was governed by first the panel and then the en banc decisions in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B) (en banc). When then reviewed by the court of appeals, the Court's decision in Strickland v. Washington had been announced.

holding that in order to demonstrate prejudice a defendant must show new, after-discovered evidence affirmatively and "clearly" supporting his innocence. It held that even in a case where the "verdict [was] only weakly supported by the record," a defendant whose trial lawyer was found (by every Florida and federal court with jurisdiction) to have fallen short of the "performance" prong of Strickland by failing adequately to investigate, discover, and prepare to meet the prosecution's case, could not satisfy the "prejudice" prong merely by establishing that counsel had thereby kicked away available and powerful means for impeaching the credibility of the two crucial prosecution witnesses. Rather the majority held that he must also (or instead) show some affirmative evidence of innocence neglected by counsel: that prejudice could be shown only by producing "evidence ... in ... post-conviction proceedings ... that could have been discovered and presented at trial that would have clearly corroborated Aldrich's alibi or supported [trial counsel's] ... speculation" that other persons had committed the capital offense. 777 F.2d at 636; App. 7a.

The court of appeals' majority applied this "new affirmative evidence of innocence" test despite its recognition of the importance of the state's two witnesses and the materiality of the impeachment lost by counsel's lack of preparation. It acknowledged that defense counsel failed to discover and present facts impeaching the credibility of Charles Strickland "who furnished the only direct evidence that Aldrich committed the murder," 777 F.2d at 637; App. 8a, and failed to conduct an adequately prepared cross-examination of Charles Strickland and another witness, who provided "[s]ome of the most damaging testimony" against Mr. Aldrich, 777 F.2d at 635; 6a. The lost impeachment evidence would have substantiated defense counsel's "speculation" that these witnesses had a "motive for committing the robbery" themselves and thus a motive for lying and blaming

Mr. Aldrich.[16] As Judge Johnson explained, because of counsel's lack of preparation "Aldrich did not have the benefit of effective cross-examination that is critical to the fact-finding process." "[I]f Strickland's testimony had been anticipated, counsel could have brought out information that would have strongly impeached Strickland's credibility ... [by showing his] motive to both commit the crime himself and to place the blame on Aldrich." 777 F.2d at 643; App. 14a (Johnson, J., dissenting).

Closely related to its "new evidence of innocence" rule. The court of appeals' majority opined that even if impeachment could be used to establish prejudice, it would be insufficient to show prejudice unless every witness, including collateral witnesses, would have been impeached such that there was no competing evidence at all. It held that the failed impeachment of the two key prosecution witnesses (Charles Strickland and Norman Sapp) was "insufficient" to establish prejudice because nothing had been shown to "impugn" the testimony of another witness, Lillie King (who lived with Strickland and Sapp), that Strickland was with her at the time of the robbery.

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16 The majority sketched an outline of this impeachment evidence:

> Strickland was living with Norman Sapp's brother, Leonard, and Leonard's wife and children. These living arrangements had been made by Norman after he and Strickland were released from prison. Before the trial, Aldrich told his counsel that Strickland was having an affair with Leonard's wife. Strickland allegedly told Aldrich that he wanted to run off to North Carolina with Leonard's wife and therefore needed money. Strickland also allegedly asked Aldrich to commit a robbery for him at a store where Strickland knew the clerk, and when Aldrich refused, this allegedly precipitated hard feelings between Strickland and Aldrich.

777 F.2d at 636; App. 7a. Judge Johnson also summarized the lost evidence impeaching Strickland:

> he was planning to leave for North Carolina with the wife of Leonard Sapp, the brother of Aldrich's former roommate, Norman Sapp, and that he needed money in order to make the move. It was for this purpose that he asked Aldrich to help rob a grocery store. Strickland was apparently angered not only by Aldrich's refusal to help him in his effort, but also by Aldrich's failure to approve of Strickland's relationship with Sapp's wife.

777 F.2d at 643; App. 14a.

In both respects, the majority's reasoning materially misconstrues Strickland and the evidence in this case. As Judge Johnson pointed out "the issue is not whether the jury, based on a review of all the facts, came to the right conclusion." 777 F.2d at 644; 15a (Johnson, J. dissenting). It is not for the court to sit as a second jury to reach a verdict. Rather the question is whether it is reasonably likely that a jury, hearing those facts, could have decided differently -- whether the lost impeachment (including the affirmative evidence of Strickland's motive and opportunity to commit the offense and his motive for blaming Mr. Aldrich) was "material." Manifestly it was. Though there were competing versions of this offense, Strickland does not propose that all competing evidence be eliminated before prejudice can be shown. To say that one remaining witness who testified as to a collateral matter defeats prejudice on an already weak prosecutive case would set up an impossible burden and one not intended by the Court.[17]

Strickland requires no more than a showing that counsel's errors had a significant, rather than "trivial" or "isolated," effect "on the inferences to be drawn from the evidence." 104 S.Ct. at 2069. In a case where "the outcome depended on which of two stories the jury believed, where there were substantial reasons to disbelieve either one," 777 F.2d at 744; App. 15a (Johnson, J., dissenting), counsel's failure to add to the unbelievability of the prosecutor's story, by impeachment evidence showing that the state's two key witnesses had a motive for committing the offense and for blaming it on Mr. Aldrich, plainly had a significant effect on the inference of credibility "to be

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17 The witness, Lillie Fay King, relied upon by the majority as determinative, lived with the key state witness, Strickland, and may have been a part of his scheme for committing the offense and because of their close (or custodial) relationship had a reason to fabricate. Regardless, the defense never contended that Strickland committed this offense alone. He and Norman Sapp are the suspects together and Strickland may well have set up an alibi while Sapp robbed and murdered Ward.

drawn from the evidence," even though one of the state's witnesses' partial alibi "defense" was left unimpugned in the eyes of the reviewing court.

Accordingly, the court of appeals' majority has misapplied Strickland. It has done so on a distinction between impeachment evidence and new exculpatory evidence that this Court has expressly rejected in the closely connected area of Brady violations.[18] The Brady prejudice standard and the Strickland prejudice formulation are the same. The court of appeals failed to recognize the Court's controlling precedent on this issue.

In applying the very same prejudice test that was articulated in Strickland to the failure of the prosecution to disclose favorable evidence, "[t]his Court has rejected any such distinction between impeachment evidence and exculpatory evidence." United States v. Bagley, ____ U.S. ____, 105 S.Ct. 3375, 3381 (1985). The Court rejected such a distinction in that context because "the 'reliability of a given witness may well be determinative of guilt or innocence.'" Giglio v. United States, 405 U.S. 150, 154 (1972). The failure to impeach the key witnesses in an already weak case thus can, without more, establish prejudice. As the Court has recognized: "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Napue v. Illinois, 360 U.S. 264, 269 (1959).

The court of appeals failed to recognize that the prejudice standard expressed by these Brady decisions also governs the prejudice standard to be applied where a defendant has been denied his constitutional right to the effective assistance of

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18 Brady v. Maryland, 373 U.S. 83 (1963) (prosecution's withholding of evidence favorable to the accused denies due process).

counsel. The Court in Strickland expressed the prejudice standard to be applied:

> a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

104 S.Ct. at 2068. As it had done in the Brady cases, the Court rejected a "more likely than not" or preponderance of the evidence test, in favor of a burden of showing that "the decision reached would reasonably likely have been different absent the errors." Id. at 2069. Thus, the standard was drawn from the test of "materiality" announced in United States v. Agurs, 427 U.S. 97, 104 (1976) and United States v. Valenzuela-Bernal, 458 U.S. 858 (1982). The prejudice standard of Strickland is a "formulation of the Agurs test for materiality." United States v. Bagley, 105 S.Ct. at 3384.[19] Just as several lower courts had erroneously devised different standards for prejudice in the Brady context depending upon the characterization of the lost evidence, the court majority below has misread Strickland by restricting prejudice to new exculpatory evidence.

By limiting its prejudice inquiry to whether the lost evidence was "clear" new exculpatory evidence or merely impeachment, the court of appeals has not only misapplied the Strickland/Agurs analysis, but has eschewed the materiality analysis suggested by the Court in favor of a mechanical test. Such a test miscomprehends the essence of the inquiry into prejudice. In Strickland the Court explained the method of analysis for making the determination of prejudice. The Court emphasized that

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19 As the court explained in Valenzuela-Bernal, there must be a "plausible showing of how [the unavailable] testimony would have been both material and favorable to [the] defense." 458 U.S. at 867. "Materiality" the Court explained "'is a concern that the suppressed evidence might have affected the outcome of the trial.'" Id. at 868 (quoting United States v. Agurs, 427 U.S. at 104 (emphasis supplied)).

"the question is whether tnere is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." 104 S.Ct. at 2069. In making this determination of whether "the decision reached would reasonably likely have been different absent the errors [of counsel]," id. (emphasis supplied), the reviewing court must "consider the totality of the evidence" by comparing the "affected" and "unaffected" findings. Id. The Court emphasized two important considerations in this determination. First, "[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture ...." Id. (emphasis supplied). And second, that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by [counsel's] errors." Id. It is therefore evident that the focus in determining prejudice must be on the "materiality" of the lost evidence in the particular case and not, as the majority below held, on the characterization of the lost evidence as impeachment or as after-discovered exculpatory evidence.

Rather than its mechanical approach, had the court of appeals undertaken a materiality inquiry that compared the "affected" and "unaffected" areas of the evidence, the "prejudice" prong of Strickland would have been satisfied. There were few areas of the evidence in this case that were "unaffected." This is so because the ineffective failure to prepare was so complete that virtually every area of the case was affected. The lack of investigation truly "had a pervasive effect on the inferences to be drawn from the evidence." Strickland, 104 S.Ct. at 2069. The case was based entirely on inferences, as a credibility contest between the illegal owner of the murder weapon who admitted prior perjury and Mr. Aldrich. "This case required the jury to unravel and choose between two conflicting versions of a murder." 777 F.2d at 642; App. 13a (Johnson, J.,

dissenting). In such a balanced setting even a small changes in those inferences could have likely shifted the outcome.[20]

The "affected" area of this case was the testimony of the two key prosecution witnesses. Had counsel been prepared he not only would have impeached their testimony still more, but he would have demonstrated their motive and opportunity to commit the offense and the motive for blaming Mr. Aldrich. Such testimony would have "alter[ed] the entire evidentiary picture." Strickland, 104 S.Ct. at 2069. The prosecution's case would have been essentially gutted by such evidence -- at the very least the "inferences to be drawn from the evidence" would have been dramatically shifted.

This inference-shifting impeachment was not the only "affected" area of the case. In addition to that major area of prejudice stemming from counsel's subprofessional performance, there were two other primary areas. First, counsel was unable to support the defense case even by information that counsel already had, but because of lack of preparation were unable to use. For example, Joyce Marshall, a security guard at a company near Al DiVagno's restaurant, testified at trial that at 1:00 a.m. on the night of the crime she saw a car that appeared to be Mr. Aldrich's car leaving a nearby warehouse (where, according to

20 As the Brady cases and Strickland make clear, a defendant need not show that the altered inferences to be drawn from the evidence that were favorable to him would have been more reasonable or more convincing than the inferences against him. Rather the Strickland/Agurs prejudice test requires only a showing that "the choice between the two interpretations would have been one the jury could have made either way had they heard the facts." Smith v. Wainwright, 741 F.2d 1248, 1255 (11th Cir. 1984). That the omitted evidence "could reasonably have led a jury to disbelieve" the accusations against the defendant, Brown v. Wainwright, 785 F.2d 1457, 1466 (11th Cir. 1986), is sufficient to show a reasonable likelihood that the omission of the evidence would have affected the outcome.

Charles Strickland, the shotgun was hidden following the crime). T 280-85. She was certain of the time because she punched a watchman's clock every twenty minutes. T 283. This time is highly significant, for Mr. Aldrich testified that he was still at Jo Ann's Quarter Bar at 1:00 a.m., and this aspect of his testimony could have been corroborated. In pretrial interviews with defense counsel's investigator, both the bar owner and her cleanup man confirmed that Mr. Aldrich was in the bar at 1:00 a.m. PCR 244, 247, 252.[21] Given Ms. Marshall's certainty of the time that she saw the car, this corroborative evidence also would have supported the other aspect of the defense theory of the case: that someone other than Mr. Aldrich was driving a car which looked like Mr. Aldrich's car on the night of the crime, and that this person, not Mr. Aldrich, committed the crime. Such facts could well have shifted the balance of credibility in favor of Mr. Aldrich.[22]

Additionally, one of the most important pieces of the prosecutor's proof could have been directly contradicted by information that counsel already possessed but were unprepared to use. Strickland testified that he drove a friend (Lillie King) to a hospital at midnight and returned home "around" 1:00 a.m. on September 3, 1974, the time during which the crime occurred.

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21 After trial, counsel filed an affidavit by the bar owner that Mr. Aldrich was in her bar that night. Though too late in the proceedings to have a legal effect, the tardy affidavit is further demonstration of what prepared counsel could have presented.

22 The majority below failed to consider this aspect of prejudice, for it misunderstood the facts proffered by Mr. Aldrich. It erroneously stated that Joyce Marshall's sworn pretrial statement indicated that she saw the car between 12:00 a.m. and 12:30 a.m. The panel then analyzed this point as relating to counsel's failure to impeach Ms. Marshall at trial. 777 F.2d at 637; App. 8a. This was not the point being argued by Mr. Aldrich. The only prior notice of Ms. Marshall's testimony came from a police officer's summary of what she would say, given at the preliminary hearing. PCR 268. Thus, there was no genuine impeachment issue. The issue instead was the confirmation of both the alibi defense and the "someone else did it" defense that could have been effected through Ms. Marshall's testimony, had the testimony of the bar owner and bar employee been presented. See 777 F.2d at 643-44; App. 14a-15a (Johnson, J., dissenting).

Shortly after his return from the hospital, Strickland said he received the telephone call in which Mr. Aldrich told him he had killed someone.

However, the sworn pretrial statement of Leonard Sapp seriously drew into question whether Strickland received this call. At the time of this incident, Strickland was a guest living in Leonard Sapp's home. When Strickland returned to Mr. Sapp's home at about 1:30 a.m. on September 3, Mr. Sapp "was up." After Strickland arrived, Mr. Sapp "went to the kitchen ... and got some water," then went to bed. As far as he knew, Strickland went to bed at the same time. No telephone call nad been received by Strickland up to tnis time. Althougn Mr. Sapp said the telephone might have rung after that and been answered by Mr. Strickland without his knowing it, it was not likely, because Strickland "don't usually answer the phone." The only reason Strickland would usually answer the telephone would be "[i]f we were all up and if I tell him to answer it ...." Id. For these reasons, when asked by the state attorney whether Strickland received a telephone call after he returned from the hospital that night, Mr. Sapp said, "Not as I know of."

While Strickland's testimony was already suspect, this evidence would have provided an additional reason, far stronger than the others, for doubting his truthfulness. Unlike the other evidence that raised questions about Strickland's truthfulness, this evidence drew into question whether Strickland actually received the incriminating telephone call from Mr. Aldrich. Perhaps more importantly the time difference (1:00 to 1:30 a.m.) also shows more than Strickland's untruth: it affirmatively demonstrates his opportunity to commit the offense that he was motivated to undertake.[23] Because this evidence questioned the

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23 The security guard said that she saw the car at exactly 1:00 a.m. -- when the occupant of the car was presumably hiding the murder weapon. Witnesses could have been called to testify that Mr. Aldrich was, as he said, in the bar at 1:00 a.m. and therefore could not have been in the car that the security guard saw at her location miles away. And Leonard Sapp, had counsel been prepared enough to ask, would have testified that Strickland was not home at 1:00 a.m. and thereby established Strickland's opportunity to have been occupant of the car that was seen by the security guard.

reliability of the most important aspect of the state's evidence, it likely could have altered the balance of credibility against Strickland.

Added to counsel's inability to meet the prosecution's case and to corroborate the defense, are the areas of affirmative harm occasioned by counsel's unpreparedness. Since he had no prior knowledge of most of the witnesses he was forced to violate a cardinal rule of trial practice -- that in examining witnesses one does not ask a question unless the answer is already known. Instead counsel was forced into a "fishing expedition" in conducting seat-of-the-pants examination of witnesses. The predictable result was elicitation of some highly harmful testimony that otherwise would have been patently inadmissible. This evidence included threats impliedly made by Mr. Aldrich against a witness,[24] unrelated collateral offenses connected with Mr. Aldrich's supposed plans to become a "hit man"[25] and Mr. Aldrich's entire criminal and prison disciplinary record in

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24 This was elicited as a complete surprise to defense counsel during his cross-examination of Norman Sapp, an important witness about whom counsel had little prior information. Sapp's testimony about receiving threats over the telephone was highly prejudicial since the unsupported inference was left for the jury that Mr. Aldrich had made those threats. Because those purported threats were unconnected by evidence to Mr. Aldrich, however, Sapp's testimony was inadmissible. It could have been avoided if counsel had known of the testimony beforehand through deposition. See, e.g., Duke v. State, 106 Fla. 205, 142 So. 886 (1932); Jones v. State, 385 So.2d 1042, 1043 (Fla. 1st DCA 1980) ("the admission of such evidence could only serve to create undue prejudice in the minds of the jury against the accused").

25 This testimony was presented by the state without objection by defense counsel, because this testimony too came as a total surprise to counsel. (In fact counsel did have prior notice of this testimony through the state attorney's pretrial conference with counsel's investigator, but counsel's failure to prepare led to his "total surprise" when this testimony was presented.) Such evidence was inadmissible under Florida's Williams rule for it was irrelevant to any issue in the case. Williams v. State, 110 So.2d 654 (Fla. 1959). The prejudice could have been avoided but cannot be doubted. See, e.g., Michelson v. United States, 335 U.S. 469, 475-76 (1948); United States v. Taglione, 546 F.2d 194, 199 (5th Cir. 1977).

specific detail.[26] Accordingly, counsel's lack of preparedness caused a seat-of-the-pants examination of witnesses that resulted directly in serious affirmative harm to the defense case that was otherwise preventable.[27]

In evaluating prejudice it should also be considered that in addition to the specific areas outlined above, there are innumerable other unidentifiable areas "affected" by the total lack of pretrial preparation. Since this case involves not the failure to investigate one or two areas or witnesses, but rather involves a total failure to prepare regarding all areas of the case, the lack of preparation is so pervasive as to make its detrimental effect impossible to fully identify (without perhaps retrying the entire case). TH 156, 198, 199, 311. For example, counsel was forced to conduct admittedly seat-of-the-pants cross-examination, because he did not know the answers to the questions he wanted to ask. TH 189-90, 198-99, 233-34. Counsel only learned of the subject of many of the witnesses' testimony when they testified. T 362. Counsel felt restrained throughout the trial in cross-examining witnesses, wanting to ask questions of witnesses but being unable to do so, not knowing the answers and thus foregoing potentially important evidence. TH 189-190, 198-199, 300.

Though from the discussion above we know some of the major areas of evidence that would have been revealed in pretrial

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26 The rule in Florida is that the details of a witness's prior criminal record are inadmissible for impeachment. See, e.g., Cummings v. State, 412 So.2d 436 (Fla. 4th DCA 1982). This highly prejudicial evidence was elicited by the state only because the defense opened the door by counsel's uninformed questioning. T 436. The court finally had to step in to cut off such questioning. T 440. It, again, could have been avoided had counsel been prepared.

27 Though the majority said that "the link between" the eliciting of this affirmatively harmful testimony and counsel's ineffective representation was "too tenuous to require a reversal of the [district court's] finding of no prejudice," 777 F.2d at 637; App. 8a, there is no other explanation but counsel's ineffectiveness for counsel bringing out such seriously prejudicial information against his client.

depositions,[28] we do not know and cannot know what other useful information may have been revealed by thoroughly probing deposition examination at that time.[29] Mr. Aldrich was denied rights given to all Florida criminal defendants, the rights to full pretrial discovery. Moreover, regardless of what information depositions would have revealed, at least counsel would have known the facts so as to be able to make reasonable strategy decisions. There are times when an inquiry into prejudice is "not worth the cost," Strickland, 104 S.Ct. at 2067, for the pervasiveness of the harm defeats an "intelligent, evenhanded application" resulting in "unguided speculation" into prejudice. Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978). Where the ineffectiveness is not limited to a few discrete identifiable errors, the prejudice is not only in what the lawyer did or the facts that were brought out, but also includes that which the lawyer was prevented from doing throughout the trial. Much of the prejudice thus is lost forever and is therefore unknowable. While such unknowable harm may not be relevant in cases where tne evidence is strong, it does deserve consideration where the evidence of guilt is weak, based solely on debatable inferences drawn from questionable testimony -- i.e. where "there was a substantial dispute over the underlying historical facts." United States v. Cronic, ____ U.S. ____, 104 S.Ct. 2039, 2050 n.37 (1984).

The areas of this case that were "affected" by counsel's deficient performance are therefore substantial. No area went untouched. Had the prosecution's case been weakened still

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28 The state introduced at the post-conviction hearing notes from counsel's file of questions be proposed to ask at the depositions he had scheduled for the week after trial. These notes reveal that counsel sought to inquire into precisely the areas mentioned above but that he did not explore at trial because he had not taken those depositions.

29 For example, whether Strickland and Sapp would have given even more inconsistent statements at deposition for use as impeachment cannot be known, because such depositions cannot be reconstructed years after the trial. Such evidence is lost forever.

further by not only the impeachment of its key evidence but by the evidence of the key witnesses' motive and opportunity to commit the crime; had Mr. Aldrich's alibi been corroborated as it surely could have been; and had counsel's own uninformed witness examinations not done grave harm to Mr. Aldrich by eliciting otherwise condemned evidence, at the very least "the decision reached would reasonably likely have been different." Strickland, 104 S.Ct. at 2069.

The prosecution put on its best case, practically without effective challenge, yet even so it was weak.[30] At the same time, "[b]ecause of his counsel's lack of preparation, Aldrich's story has never really been presented before a jury." 777 F.2d at 644; 15a (Johnson, J., dissenting). There is, from the record in this case, a reasonable likelihood that Mr. Aldrich is innocent, and the prejudice question, undecided by the majority, is whether counsel's deficient conduct was material to that determination.

Certiorari is therefore warranted because the court of appeals materially misconstrued the Court's explication of prejudice resulting from constitutionally deficient representa-

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30 The dissenting opinion in the divided affirmance of Mr. Aldrich's conviction and sentence on direct appeal in the Florida Supreme Court, found that though the evidence was technically sufficient to support a guilty verdict, it was too weak to permit a death sentence because of the significant risk of executing an innocent person. The opinion summarized the evidence:

> [T]he only evidence of substance tying appellant to the crime was given by a convicted felon [Charles Strickland] who had purchased and possessed the murder weapon in violation of conditions of his own parole. The witness admitted at trial that he had committed perjury by lying under oath to police in connection with statements made about this crime. He further admitted he feared being returned to prison for buying and lending the death weapon to appellant. He had compelling reasons to implicate appellant or anyone else in the crime, since his gun was proven to have been used in the killing.

Aldridge v. State, 351 So.2d 942, 944-45 (Fla. 1977) (Boyd, J. dissenting). This asssessment of the weakness of the evidence was made before it was known that counsel had ineffectively prepared this case.

tion. The issue is narrowly drawn as to whether impeachment evidence, as opposed to after-discovered exculpatory evidence, can demonstrate prejudice in an already weak prosecutive case.

The prejudice to Mr. Aldrich from being placed on trial for his life with unprepared counsel cannot be doubted. There is a serious and somber risk of mistake in this case that can only be corrected by the Court.

MR. ALDRICH WAS DEPRIVED OF THE INDIVIDUALIZED SENTENCING DETERMINATION REQUIRED IN CAPITAL CASES BY THE EIGHTH AMENDMENT BECAUSE THE AUTHORITATIVE PRE-LOCKETT APPLICATION OF FLORIDA LAW TO PRECLUDE CONSIDERATION OF NON-STATUTORY MITIGATING CIRCUMSTANCES EXCLUDED THE ONLY MITIGATING FEATURE OF RECORD IN HIS CASE -- RESIDUAL DOUBT ABOUT GUILT.

Despite the mandate of Lockett v. Ohio, 438 U.S. 586 (1978), Florida law as announced and enforced by the Supreme Court of Florida continues to strictly prohibit, as a matter of law, consideration of "residual doubt" about the capital defendant's guilt in determining whether that defendant should live or die:

> A convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.

Buford v. State, 403 So.2d 943, 953 (Fla. 1981). Accord Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985) (citing Buford). As Justice Marshall noted in finding a Lockett violation in another case where the judge had found that the jury had relied upon "an 'invalid' mitigating circumstance stemming from residual feelings of doubt as to guilt," this principle "seems to have been enshrined in Florida law." Heiney v. Florida, ___ U.S. ___, 105 S.Ct. 303, 304 (1984) (Marshall, J., dissenting from the denial of certiorari). See also Burr v. Florida, ___ U.S. ___, 106 S.Ct. 201 (1985) (Marshall, J., dissenting from the denial of certiorari) (same).

In contrast, this Court has recently recognized as legitimate the need to permit juries to consider "residual doubts" in determining the appropriate sentence in a capital case. Lockhart v. McCree, ___ U.S. ___, 54 U.S.L.W. 4449, 4454 (May 5, 1986). As quoted by the Court:

> "jurors who decide both guilt and penalty are likely to form residual or 'whimsical' doubts ... about the evidence so as to bend them to decide against the death penalty. Such residual doubt has been recognized as an extremely effective argument for defendants in capital cases."

Id. (quoting Grigsby v. Mabry, 758 F.2d 226, 247-48 (8th Cir. 1985) (en banc) (J. Gibson, J., dissenting)). Accord Smith v. Wainwright, 741 F.2d 1248, 1255 (11tn Cir. 1984); Smith v. Balkcom, 660 F.2d 573, 580-81 (5th Cir. 1981) (Unit B). Cf. King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) ("circumstantial evidence which however strong leaves room for doubt ... might convince a jury and a court that the ultimate penalty should not be exacted, lest a mistake may have been made"). In responding to the dissent in Lockhart concerning Florida's (as well as several other states') exclusion of "residual doubt" from the capital sentencing determination, the Court found that exclusion to "justify skepticism" concerning those states' procedures. 54 U.S.L.W. at 4454.

The importance of residual doubt concerning guilt in the capital sentencing determination cannot be questioned, nor can its legitimacy. Residual doubt about guilt "would be 'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" Skipper v. South Carolina, 54 U.S.L.W. at 4404 (quoting Lockett v. Ohio, 438 U.S. at 604). Likewise, there is "no disputing" the Court's Eighth Amendment mandate that "'"the sentencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense..."'" Skipper v. South Carolina, ___ U.S. ___, 54 U.S.L.W. 4403, 4404 (April 29, 1986) (quoting Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (original emphasis)).

Such residual doubt about guilt was at issue in the present case, but was excluded from consideration by the sentencing jury and judge by the operation of Florida law. That it is an important consideration in the present case can be seen by its application by the dissenting opinion in the Florida Supreme Court in the direct appeal of this case. Justice Boyd opined that though "[i]t may very well be true that appellant is the murderer," the proof of guilt was too tenuous to support a death sentence: "this Court is not permitted to approve a sentence of death until each case is weighed by the criteria stated in the statute. The facts shown by the record do not afford a lawful basis for ... infliction of capital punishment." Aldrich v. State, 351 So.2d at 945 (Boyd, J., dissenting).[31]

Although Florida law still plainly precludes as a matter of law, the consideration in sentencing of "residual doubts" about the evidence of guilt, and as will be set out below, such consideration was excluded from the process of sentencing Mr. Aldrich, the court of appeals did not resolve the Eighth Amendment question. Rather, the court found that review was barred under Wainwright v. Sykes, 433 U.S. 72 (1977) because it found a "procedural default." 777 F.2d at 638; App. 9a. The "default" relied upon by the court of appeals is not a bar to review by the Court, since that default finding was based upon a misperception both of the record in this case and of the issue presented.

As to the court of appeals' misconception of the record, it overlooked the fact that the Florida Supreme Court ruled upon "residual doubt" as it pertains to the propriety of the death

31 Even as it stands, without consideration of residual doubt about guilt, the death sentence is far from being overwhelmingly supportable. The only aggravating factors are those inherent in the conviction itself, i.e. felony murder. The felony murder here was not one that was "set apart from the norm," State v. Dixon, 283 So.2d 1 (Fla. 1973), and as such was an insubstantial basis upon which to rest a death sentence. See McCaskill v. State, 334 So.2d 1276 (Fla. 1977); Rembert v. State, 445 So.2d 337 (Fla. 1984).

sentence in affirming that sentence. To find a "default" the court of appeals quoted a portion of the opinion on direct appeal:

> "the trial court found no mitigating circumstances and Aldridge does not contest that finding on appeal."

777 F.2d at 638; App. 9a (quoting Aldridge v. State, 351 So.2d at 944 n.4). The court of appeals, however, failed to quote the remainder of the court's statement:

> Rather, Aldridge through his counsel, admitted the lack of mitigating circumstances and specifically requested the trial judge to impose the death penalty rather than incarcerating him for the minimum 25 years under our life statute. This request, of course, has no bearing on our decision. We have a duty to review the record in every case where the death penalty is imposed. Section 921.141(4), Fla. Stat. (1975).

Aldridge v. State, 351 So.2d at 944 n.4. (emphasis supplied).[32] Moreover, the dissent in the Florida Supreme Court expressly considered doubt about Mr. Aldrich's guilt as an independent reason invalidating the death sentence. Id. at 944-45 (Boyd, J., dissenting). Plainly the question was decided by the court. See Gardner v. Florida, 430 U.S. 349, 361 (1977) ("since two members of that court expressly considered this point on appeal in this case, we presume that the entire court passed on the question"). There can be no doubt that the Florida Supreme Court, in the exercise of its independent duty to review all evidence relative

32 The Florida court thus independently reviewed the propriety of the death sentence under its own rules. It has done the same in other cases. In Goode v. State, 365 So.2d 381 (Fla. 1979) the court refused the defendant's request to dismiss his appeal despite his "expressed desire to be executed," because "this Court must, nevertheless, examine the record to be sure that the imposition of the death sentence complies with all of the standards set by the Constitution, the Legislature and the courts." Id. at 384. In Davis v. State, 461 So.2d 67 (Fla. 1985), the defense had made an admitted "tactical decision not to [challenge the death sentence]." Id. at 71. Nevertheless the Court reviewed the death sentences because the statute "directs this Court to review both the conviction and sentence in a death case, and we will do so here on our own motion." Id. The court reviewed both the aggravating circumstances (and struck one) and the trial court's method of considering mitigating factors. Id. See also Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981) (defendant did not brief the imposition of the death sentence, but "still we must review the propriety of the death sentence" and then vacated that sentence, inter alia, because the judge restricted mitigation to the statutory factors).

to the sentencing determination, did review whether the trial judge appropriately found that there was no evidence of mitigating circumstances.[33] As the Florida court later explained, in its review of Mr. Aldrich's sentence:

> This Court clearly addressed the propriety of the aggravating and mitigating circumstances and the appropriateness of the death sentence in accordance with the law as it was established at the time of the decision of this case on the merits.... [T]his Court found that there were no mitigating circumstances and that there were adequate statutory aggravating circumstances to sustain the death penalty.

Aldridge v. Wainwright, 433 So.2d 988, 989 (Fla. 1983).[34]

Where it is quite obvious that the Florida Supreme Court neither as a general rule nor in this case in particular, accords any "waiver" with regard to either the propriety of the specific aggravating and mitigating factors or to the process by which the sentence was determined, there is simply no reason for the court of appeals to "find" such a waiver. Even where a defendant consciously and deliberately as a tactic does not challenge the death sentence, the court nevertheless reviews it -- and in particular, reviews for any limitations on consideration of mitigation, Davis v. State, supra; Jacobs v. State, supra.

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33 See also Eddings v. Oklahoma, 455 U.S. 104, 113 n.9 (1982) (though the defendant did not in the state court challenge the restriction on mitigating factors as violative of the death penalty, the issue was appropriate for review because the appellate "court examined the aggravating and mitigating circumstances and held that Eddings' family history and emotional disorder were not mitigating circumstances that ought to be weighed in the balance").

34 The Florida Supreme Court has consistently held that it has an independent duty to review the propriety of the imposition of the death penalty in the direct appeal of each capital case. See, e.g., State v. Dixon, 283 So.2d 1, 10 (Fla. 1973); Songer v. State, 322 So.2d 481 (Fla. 1975); Hargrave v. State, 366 So.2d 1, 4-5 (Fla. 1979); McCampbell v. State, 421 So.2d 1072, 1074 (Fla. 1982). In the exercise of this independent duty, the court reviews whether "all relevant data was considered" by the sentencer. LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978). Accordingly, even where a capital appellant's counsel "has not challenged the legal sufficiency of [his client's] convictions and sentences on any basis," id. at 150, the Florida court has held that it is "obligated by law and rule of this Court to ascertain whether they are proper." Id.

Accordingly, there is no procedural default which bars the Court's consideration of this claim. County Court of Ulster County v. Allen, 442 U.S. 140, 154 (1979). Accord Lefkowitz v. Newsome, 420 U.S. 283, 292 n.9 (1975); Francis v. Henderson, 425 U.S. 536, 542 n.5 (1976).

Perhaps more critically, however, the court of appeals default finding misperceived the issue presented in a manner tnat inextricably intertwined the default "facts" with those supporting the merits of the Eighth Amendment question. As the Court is by now well aware, the Florida capital sentencing statute was applied at the time of Mr. Aldrich's trial (and appeal) -- prior to Lockett v. Ohio, 438 U.S. 586 (1978) -- in a manner that strictly limited the mitigating factors that could be considered to only those specifically set out in the statute.[35]

As Mr. Aldrich's trial counsel testified at the post-conviction hearing: "as far as the mitigating circumstances; yes, it was my opinion and I believe the [trial] Court was of the opinion, also, that it was limited to ... the statute." TH 191 (emphasis supplied). Counsel also emphasized that the one mitigating factor that Mr. Aldrich did not "waive" was doubt

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35 Since the restrictive application of the pre-Lockett Florida law is presently before the Court in several cases that document that limiting application, Mr. Aldrich will not here burden the Court with additional repetition of that documentation. See Darden v. Wainwright, No. 85-5319, cert. granted, September 3, 1985; Hitchcock v. Wainwright, No. 85-6756, pet. for cert. filed, April 18, 1986; Wainwright v. Songer, No. 85-567, pet. for cert. filed, September 18, 1985; Sireci v. Florida, No. 84-6895, pet. for cert. filed, June 12, 1985. For present purposes it is sufficient to note, as the Florida Supreme Court only recently recognized, that "our death penalty statute could have been reasonably understood to preclude the introduction of nonstatutory mitigating evidence." Harvard v. State, ___ So.2d ___, 11 F.L.W. 55, 56 (Fla. February 6, 1986).

about his guilt.[36] However, because Florida law limited consideration of mitigating factors to only those in the statute, it was believed that doubt about guilt could not be presented in mitigation. Thus, with regard to the "waiver" found so determinative by the court of appeals, counsel testified that: "if [Mr. Aldrich] had known the state of the law as it is today [referring to Lockett], he might not have instructed me the same way." TH 215.

Accordingly, the very waiver upon which the court of appeals relied in finding a default was the very matter at issue. Because of the unconstitutional limitation on mitigating circumstances in the application of Florida law at the time, the record shows that the defendant, defense counsel, the prosecutor, the trial judge, and the Florida Supreme Court restricted the capital sentencing consideration to only statutory mitigating factors. Residual doubt about guilt was not among the statutory list -- and even today Florida excludes its consideration.

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36 For example, when Mr. Aldrich sought to waive a penalty defense, the trial judge inquired by reading the list of statutory mitigating factors. T 605-606. At the conclusion of that reading, the following was said:

> MR. SCHWARZ [defense counsel]: Mr. Aldrich, while we are on the record, you have heard the court read to you the mitigating circumstances as set forth in the statute.
>
> THE DEFENDANT: Yes.
>
> MR. SCHWARZ: Do you have knowledge of any evidence that we could present in your behalf that would support any of these mitigating circumstances?
>
> THE DEFENDANT: Not any.
>
> MR. SCHWARZ: Other than the fact that you deny doing it?
>
> THE DEFENDANT: Yes, sir.

T 606-607 (emphasis supplied).

It is evident, therefore, that residual doubt about Mr. Aldrich's guilt was excluded from consideration in determining Mr. Aldrich's sentence and in reviewing the propriety of his sentence. By operation of Florida law -- both the now-discarded rule that restricted mitigation generally and the even-still-enforced preclusion of residual doubt in particular -- a powerful and relevant mitigating feature of the case was excluded from consideration in his case. The issue is the operation of Florida law to deny an individualized sentencing as mandated by the Eighth Amendment.

Certiorari is appropriate to permit review of the restricted pre-Lockett application of Florida law that resulted in this case in the preclusion of the only mitigating factor in the record that called for a sentence less than death.

CONCLUSION

For these reasons, petitioner prays that the Court issue its writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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